Secretary but at the pleasure of the Ruler which is subject to the constitutional guarantees under article 135.

Adverting to the judgment in *Dhingra's case*, it would appear that the right acquired by a Government servant to hold his post is not a right conferred by any provision in the service rules but by implication arising from the nature of the tenure of office. A person who holds a substantive appointment in a permanent post is said to acquire that right. In this country Government posts are not designated as permanent or semi-permanent. Government servants here hold office on a temporary basis or on probation subject to confirmation or, when confirmed, on timescale. A timescale officer must be regarded as being in the permanent service. That is why the appellant's head of department, in the course of his evidence, said that he was a Division III officer holding a non-pensionable permanent appointment. The post of a *Kathi* is a permanent post in the State Administrative Service. The appellant was the substantive holder of that post. He held his appointment on timescale under a scheme of service which envisages employment during the pleasure of the Ruler from date of appointment to date of retirement. Applying the principle in *Dhingra's case*, the appellant must be deemed to be the holder of a substantive office in a permanent post and, as such, the premature removal from office for alleged misconduct must be regarded as a punishment by itself.

However, article 132(2) of our Constitution provides that in the case of public servants other than those employed in the service of a State, the Yang di-Pertuan Agong may by federal law regulate the qualifications for appointments and conditions of service and that in the case of public servants employed by a State, the Ruler or Governor, as the case may be, may regulate such qualifications and conditions. Despite the very wide powers given to the Yang di-Pertuan Agong or the Ruler or Governor to regulate the conditions of service, those powers can only be exercised subject to the provisions of the Constitution which is the supreme law. It must follow, therefore, that any regulation in Cap. D which is inconsistent with or which contravenes any of the provisions of the Constitution is *ultra vires* and the court will have to disregard it. The full implication of regulation 36 of Cap. D is that where Government desires to take disciplinary action against a public servant, even by dismissal for misconduct, it could in the case of non-pensionable officer in Division III disregard the provisions of regulation 32 which provides that "the officer concerned must be given an adequate opportuunity of exculpating himself" and terminate his appointment by giving him three months' notice without assigning any reason. The regulation, in my opinion, violates the constitutional guarantee given to a public servant under article 135(2) of our Constitution, and must be regarded as either void under article 4(1), if the service regulations under Cap. D were re-issued after Merdeka Day on the authority of the Yang di-Pertuan Agong or should be read with such modification so as to conform with the constitutional guarantees by virtue of the provisions of article 162(6), if the intention was to terminate his employment for misconduct.

It is not denied that the appellant's service was terminated because of an alleged misconduct. His request to his head of department for permission to explain his conduct to the Ruler was turned down. Therefore, he had been denied his constitutional right to be heard before dismissal. The appeal must, therefore, succeed with costs here and in the court below.

The judgment of the High Court should be set aside and judgment entered for the plaintiff in terms of paragraph 6 of the statement of claim.

Appeal dismissed.

Solicitors: *K. L. Devaser & Co.*

ANJALAI AMMAL & ANOR. v. ABDUL KAREEM

[F.C. (Barakbah L.P., Azmi C.J. (Malaya) and MacIntyre F.J.) September 15, 1968]

[Penang — Federal Court Civil Appeal No. X26 of 1968]

Practice and Procedure — Pleadings — Particulars — Parties bound by pleadings.

Land Laws — Adverse possession — Acquisition of indefeasible title — Inquiry into.

This was an appeal against the decision of the High Court reported in [1968] 2 M.L.J. 92. The issue for trial which arose from the pleadings in this case was whether one *K* had acquired an indefeasible title by adverse occupation before May 30, 1955. The learned trial judge held that *K* had not acquired an indefeasible title before May 30, 1955, but he went on to hold that the continuity of adverse possession was not broken since there was evidence that one Ooi Boon Kay, to whom *K* had transferred her interest in the land, went into possession through his agent, *K*. The appellant appealed.

Held, allowing the appeal: the learned trial judge had in this case departed from the strict rules of procedure in deciding the case on an issue not raised in the pleadings and he should have dismissed the claim, once he found that *K* had not acquired an indefeasible title against the owner by adverse possession, on or before May 30, 1955.

Cases referred to:—

(1) *Trustees, Executors, & Agency Co. Ltd. & Templeton* v. *Short* (1883), 13 App. Cas. 793.

(2) *Thomson* v. *Birkley* (1883), 47 L.T.R. p. 700.

(3) *Spedding* v. *Fitzpatrick* (1888), 38 Ch.D. 410 at 413.

(4) *Thorp* v. *Holdsworth* (1876), Ch.D. 637 at 639.

(5) *Yorkshire Provident Life Assurance Co.* v. *Gilbert & Rivington* [1895] 2 Q.B. 114 at 152.

FEDERAL COURT.

S. Thillaimuthu for the appellants.

Ong Huck Lim for the respondents.

Cur. Adv. Vult.

Barakbah L.P.: I have had the advantage of reading the judgment of my brother MacIntyre F.J. with whom I agree that the appeal must be allowed with costs to the appellants here and in the court below.

MacIntyre F.J.: This is an appeal against the decision of Mr. Justice Chang Min Tat at the High Court in Penang dismissing a claim by the appellants for a declaration that they, as the personal legal representatives of the estate of one A.N. Kathiravaloo Assaree, deceased, are the owners in fee simple of two pieces of land situate in the North East District of Penang forming part of a land comprised in Grant No. 168 and known as lots 447(3) and 447(4), Township Subdivision, 9W (hereinafter referred to as the said lands) and for consequential reliefs.

The said A.N. Kathiravaloo Assaree (hereinafter referred to as the deceased) had mortgaged the said lands in 1929 to one Muthu Karuppan Chettiar to secure the payment of a sum of $1,500 and interest thereon. The loan was never repaid. He died intestate on August 11, 1936, leaving surviving him a widow, the first appellant herein, and 2 infant children. Neither the deceased nor the first appellant had ever lived on the said lands. In October, 1937, the first appellant married the second appellant. After the death of the deceased, Muthu Karuppan Chettiar made no demand for the principal or interest due on the mortgage deed. He is said to have left Penang for good and his whereabouts are now unknown. In 1950 the appellants jointly applied for letters of administration to the estate of the said deceased in respect of the said lands. The grant was made on May 23, 1950, but was not extracted until September 14, 1965. In the meanwhile, one Khatijah binti Che Mat Ibrahim (hereinafter referred to as Khatijah), the wife of the respondent herein, having sworn a statutory declaration on May 30, 1955, before a commissioner of oaths at Penang, claiming to have been in peaceful possession of the said lands for over fifteen years, executed on the same day a deed poll wherein she purported to convey the said lands in fee simple to one Ooi Boon Kay. Then on October 10, 1958, the said Ooi Boon Kay executed a deed of conveyance which purported to convey to the respondent the said lands in fee simple.

The writ in the instant case was issued on November 19, 1965. The appellants claim right of possession to the said lands as the personal legal representatives of the true owner and aver that the respondent is in possession by virtue of the conveyance dated October 10, 1958, executed by Ooi Boon Kay, who had no right title or interest in the said lands to convey an estate in fee simple. They aver that he could not have acquired any such right title or interest under the deed poll because Khatijah herself could not have, in law, acquired an estate in fee simple by long possession for 15 years before May 30, 1955.

The respondent in his statement of defence claims validity of title by virtue of the deed of conveyance executed to Ooi Boon Kay and the validity of the conveyance to him by Khatijah, who he claims had acquired an estate in fee simple in the said lands by being in adverse possession for over 15 years before the execution of the deed poll of May 30, 1955. He pleads, therefore, that the suit is barred by limitation under the provisions of sections 9(1) and 18 of the Limitation Ordinance, 1953. Section 9(1) reads:—

> "9(1) No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person."

Section 18 reads:—

> "18. At the determination of the period limited by this Ordinance to any person for bringing an action to recover land the right and title of such person to the land for the recovery whereof such action might have been brought within such period, shall be extinguished."

In considering the defence of limitation, however, the provisions of the Malayan Union Limitation (Enemy Occupation) Ordinance No. 4 of 1946 and the Moratorium Proclamation (Repeal) Ordinance No. 37 of 1949 cannot be overlooked. Section 2(1) of the Limitation (Enemy Occupation) Ordinance, 1946 reads:—

> "2. (1) Notwithstanding anything contained in the existing laws regulating the limitation of actions, suits and other proceedings, all periods of limitation of actions, suits or other proceedings, whether they began to run before, on or after the 1st day of January, 1942, shall be treated as having been suspended during a period commencing on the 1st day of January, 1942, and ending on the day of which the moratorium is lifted:
>
> Provided that . . . . (*not applicable*)."

The Moratorium Proclamation (Repeal) Ordinance, 1949, came into force on October 1, 1949. Section 2 thereof reads:—

> "2. The Moratorium Proclamation is hereby repealed. Provided that . . . . (*not applicable*)."

Therefore, in computing time for the purpose of section 9(1) of the Limitation Ordinance, 1953, in respect of the period of 12 years immediately preceding May 30, 1955, a period of 7 years and 9 months commencing from January 1, 1942 and ending on September 30, 1949, has to be excluded. In the result, assuming that

Khatijah had been in actual possession of the said lands for 15 years preceding May 30, 1955, the period she was in adverse possession by operation of law was only 7 years and 3 months. In other words, on the date when she purported to convey an estate in fee simple in the said lands to Ooi Boon Kay, her title was inchoate and was not good against the true owner.

However, in the statutory declaration referred to in the statement of claim, Khatijah claims to have been in adverse possession before May 30, 1955, for not merely 15 years but for a period exceeding 15 years. The appellants' solicitor, therefore, asked for further and better particulars. Pursuant to rule 7A of Order 19 of the Rules of the Supreme Court the respondent's solicitors filed and served a statement of further and better particulars dated January 14, 1966. The particulars indicate that Khatijah was in actual physical possession of the said lands, but insofar as the length of the time when she was in adverse possession is concerned, the particulars again state that she was in adverse possession for over 15 years before May 30, 1955.

On these pleadings, the action went to trial. It became clear, however, from the evidence of Khatijah and the evidence of one Rawther (D.W.3) that she and her mother first started to make use of the said lands in 1939. The said lands adjoin Lot 447(5) on which stands house No. 166E, Jalan Mohamed Taib. This house, according to the evidence, was rented out for purpose of residence by Khatijah's mother in 1939 who thereafter moved into it with her family. The respondent, however, went to live in the said house after his marriage to Khatijah on June 13, 1940. So, even assuming that Khatijah took possession of the said lands on January 1, 1939, she could not have acquired an indefeasible title as against the true owner unless she had remained in adverse possession for a further period of 1 year and 9 months after May 30, 1955.

Particulars filed in a suit are an integral part of pleadings. The plea of limitation is raised in paragraph 5 of the statement of defence. Under item (b) of the letter (see page 110 of the record) asking for particulars pursuant to rule 7A of Order 19 of the Rules of Supreme Court, the respondent was specifically asked to state the period of adverse possession he was relying on to plead protection under the Limitation Ordinance. The reply to (b) in the statement of particulars reads as follows:—

"Over fifteen (15) years before the 30th day of May, 1955."

It is clear, therefore, that the respondent was relying solely on adverse possession by Khatijah before May 30, 1955.

The appellants at the trial tried to make out that the fruit trees on the said lands were leased to the respondent by the deceased about 6 months before his death on August 11, 1936; and that the respondent was then living in house No. 166E. The respondent denied leasing the trees and averred that he first went to live in house No. 166E in 1940 after his marriage to Khatijah. He further averred that from 1936 to 1938 he was employed as a clerk with the F.M.S. Railways at Kuala Lumpur. The learned trial judge rejected the evidence of the appellants and accepted the evidence of the respondent. He also accepted Khatijah's evidence that she first took possession of the said lands in 1939.

According to the notes recorded by the learned trial judge, I find the following note in regard to the final address by the counsel for the appellants. The note reads: "Deft. must stand or fall on his pleadings." However, it also appears from the notes that counsel for the appellants did argue that even if the period after May 30, 1955 is taken into consideration in computing time for the purpose of adverse possession, there had been a break in the continuity of possession between May 30, 1955 and October 10, 1958 by the failure of Ooi Boon Kay to enter upon and take possession of the said lands. In the circumstances, it was contended, on the authority of the *Trustees, Executors, and Agency Co., Ltd. and Templeton* v. *Short*,[1] that possession had reverted to the true owner and a fresh period of adverse possession commenced when the respondent took possession on October 10, 1958 and that the requisite time has not expired in order to confer an indefeasible title against the true owner.

Whether Ooi Boon Kay entered on the said lands or not is a question of fact. Since that issue was not raised by the pleadings, neither party was under any obligation to call Ooi Boon Kay to give evidence, and, in fact, he was not called. The learned judge, however, held that although Khatijah had not acquired an indefeasible title before May 30, 1955, the continuity of adverse possession was not broken since there was evidence that Ooi Boon Kay went into possession through his agent, Khatijah. With the greatest of respect, I am unable to find any evidence of such an agency from the recorded notes of evidence. But there is no need for this court to go into that question or decide whether the principal in the *Trustees, Executors, and Agency Co., Ltd. and Templeton* v. *Short* applied to the facts of the case. The sole issue for trial was whether Khatijah had acquired an indefeasible title by adverse occupation before May 30, 1955. The reference by counsel to the *Trustees, Executors, and Agency Co., Ltd. and Templeton* v. *Short* was an unnecessary display of legal erudition which had the unfortunate effect of side-tracking the learned judge's mind into deciding the case upon an issue not properly before the court.

There is considerable authority in regard to the purpose and effect of particulars filed pursuant to Order 19, rule 7A of the Rules of the Supreme Court. At page 31 of *Halsbury* (3rd ed.) Vol. 3, the learned commentator has this to say:—

"A party is bound by his pleadings unless he is allowed to amend them, and he is therefore bound by his particulars, which are, in effect, part of the pleadings under which they are delivered."

In *Thomson* v. *Birkley* [2] Watkin Williams J. says:—

"The object of particulars is to prevent surprise, and to limit and particularise events in order that both parties should come to trial fully prepared for the issues."

In *Spedding* v. *Fitzpatrick* [3] Cotton L.J. says:—

"The object of particulars is to enable the party asking for them to know what case he has to meet at the trial, and so to save unnecessary expense, and avoid allowing parties to be taken by surprise."

In *Thorp* v. *Holdsworth* [4] Jessel M.R. says:—

"The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules of Order XIX was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to definite issues, and thereby to diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

Finally, in *Yorkshire Provident Life Assurance Co.* v. *Gilbert & Rivington* [5] Lindley L.J. says:—

"What is the effect of these particulars? I take it the effect of these particulars is this, that the issues to be tried are limited by these particulars in the first instance. I do not mean to say that leave cannot be obtained to add to the particulars — of course it can; but the moment these particulars are delivered, and until some further order is obtained for the delivery of further particulars, the effect of delivering the particulars is to cut down the matters in question in the action to the particulars."

Therefore, in my opinion, the learned trial judge, in the instant case, had departed from the strict rules of procedure, in deciding the case on an issue not raised in the pleadings and on the assumption of a fact which the appellants were not obliged to call evidence to rebut. The respondent, by his statement of defence and more definitely by the answer to question (b) in the particulars, limited the court's ambit of inquiry into just finding an answer to the question whether or not before May 30, 1955, Khatijah had acquired an indefeasible title against the true owner by adverse possession. The trial judge having held that Khatijah had not acquired such a title, should have forthwith decreed the suit in favour of the appellants.

This appeal must, therefore, be allowed with costs to the appellants here as well as in court below.

Azmi C.J. (Malaya) concurred.

Appeal allowed.

Solicitors: *S. Thillaimuthu; Ong Huck Lim & Co.*

PUBLIC PROSECUTOR v. PAGHUTHEEN

[R.Cr.J. (Ong Hock Sim J.) September 17, 1968]
[Penang — Criminal Revision No. 6 of 1968]

Criminal Law and Procedure — Plea of guilty by accused — Magistrate not recording facts on which sentence based.

Road Traffic — Charge of carrying goods without carriers licence — Insurance offence — Plea of guilty by accused — Disqualification — Whether justified — Road Traffic Ordinance, 1958, ss. 74(1), 98(1) & (2).

The defendant was convicted on his plea of guilty of offences under sections 74(1) and 98(1) of the Road Traffic Ordinance and fined $100 and $30 respectively and disqualified from driving for a period of one year. On revision it was found that the magistrate had not recorded any facts for the purposes of assessing sentence.

Held: (1) it was the duty of magistrates where an accused had pleaded guilty to record some evidence upon which the sentence may be based and upon which on appeal the adequacy or otherwise of the sentence could be reviewed;

(2) in this case as the defendant was using a motor vehicle for removing goods from a disabled motor vehicle to a place of safety, the case was covered by section 98(2) of the said Ordinance and the convictions and order of disqualification should be quashed and the fines refunded.

Cases referred to:—

(1) *Public Prosecutor* v. *Cheah Tin* [1939] M.L.J. 266.

(2) *Lee Yu Fah* v. *Public Prosecutor* [1937] M.L.J. 179.

CRIMINAL REVISION.

Haji Suhaimi bin Dato' Haji Kamaruddin (Deputy Public Prosecutor) for the Public Prosecutor.

Respondent in person.

Ong Hock Sim J. (delivering oral judgment): This defendant was convicted on his own plea of guilty to two charges:—

1st Charge

"That you on 26.2.68 at about 3.40 p.m. at Bayan Lepas, Penang did use motor car PA. 1317 for the carriage of bread without a carrier's licence and that you have thereby committed an offence punishable under section 98(1) of the Road Traffic Ordinance No. 49 of 1958."

2nd Charge

"That you on the same date, time and place did use the said motor car without there being in force in relation to the use of such motor vehicle such a policy of insurance or such security in respect of third party risks and that you have thereby committed an offence under section 74(1) punishable under section 74(2) of the Road Traffic Ordinance No. 49 of 1958."